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1 See Vol. 3048

No. 15,640

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN PHILLIP ZANNARAS, J. P. ROBINSON, JR. and U. S. TUNGSTEN CORPORATION,
Appellants,

vs.

BAGDAD COPPER CORPORATION,
a corporation,
Appellee.

APPELLANTS' REPLY BRIEF.

JOHN PHILLIP ZANNARAS,
J. P. ROBINSON, JR.,
U. S. TUNGSTEN CORPORATION,
P. O. Box 500, Congress, Arizona,
Appellants.

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Texts

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APPELLANTS' REPLY BRIEF.

A great portion of appellee's brief is not open for review by this Appellate Court because as it was stated in appellants' opening brief (page 40) the controlling law in this case is the rule of the law of the case. Many issues discussed by appellee have been urged before on this Appellate Court, reviewed and disposed of.

We hold that all references in appellee's brief referring to the transcript of the affirmed case 321 consolidated for trial with case 221—*Bagdad v. Zannaras,* 229 F. 2d 920, and indicated by the number of said appeal, 14248 R, made for the purpose of defeating appellants' right are not reviewable by this Court.

We base our contention on the ruling of the following two cases from which we quote. *New York Life Insurance Co. v. Gamer,* 106 Fed. 2d 375:

> "While affirmance of judgment must be considered adjudication by Appellate Court none of claims or errors are well founded, though all are not specifically referred to in opinion."

Also in the case *Bennet v. City of Salem, Oregon,* 235 P. 2d 772 already quoted in appellants' brief (page 29) . . . that the estoppel must extend to every matter which might have been urged in case 321 to defeat the right, title or interest of Zannaras-Robinson.

Also on the principle that this Appellate Court has already reviewed this question.

Most of the second volume of this appeal which contains the expert testimony which is admitted in appellee's brief (page 27) is a relitigation of the deprivation of the Zannaras-Robinson water by Bagdad decided in Cause 321 Prescott while this case was pending on appeal before this Appellate Court by a perfected appeal No. 14248, is not before this Court for nonjurisdiction of the District Court.

As we pointed out in our opening brief (page 38) an appeal or error proceeding divests the trial Court of jurisdiction over matters necessarily involved in the review proceedings only (citing *White v. White,* 106 Pa. Super. Ct. 83, 161 A. 461). Vol. 3, *Am. Jur.,* Appeal and Error, Section 53, page 194.

We quote from *Rothchild & Co., et al. v. Marshall,* 51 Fed 2d 897,

"District Court is without jurisdiction of cause pending appeal from its judgment."

On November 23, 1953, appellee filed a notice of appeal to this Appellate Court from the judgment of the Federal Court of the District of Arizona, entered against it in civil cause 321 Prescott (14248 R 43) and expressly presented to this Court in its assignments of errors and points to be relied on on appeal, the following:

That the District Court erred in ruling that for approximately five (5) months in each year due to appellant's (Bagdad's) pumping operations and use of water there was no water at appellees' (Zannaras-Robinson) point of diversion (14248 R 434) and also, that the District Court erred that appellant's use interfered with use of appellees at their point of diversion (14248 R 435).

According to appellee's brief (p. 27) on March 9, 1954, appellee was relitigating in the same District Court the same questions of the deprivation of the Zannaras-Robinson water by Bagdad on the same evidence already presented in cause 321 and pending then before this Appellate Court. In other words appellee was attempting to disprove in the District Court by expert opinion the findings established in cause 321 that for five (5) months there was no water at the Zannaras-Robinson diversion point due to Bagdad's use above, and simultaneously was urging on both Courts, Appellate and District, the *Albion-Idaho Land Company v. NAF Irrigation Company,* 97 Federal 2d page 439 (R 350) as a case to support its point of view.

The District Court having no jurisdiction to relitigate an issue pending before the Appellate Court it appears

that all the expert testimony in the last volume is not before this Court of Appeal, for lack of jurisdiction of the District Court on this question.

Appellee is basing its claim that actually case 221 was relitigated in the hearing of March 9, 1954, because appellants' counsel made no objections that this evidence was improperly admitted (Appellee Brief, page 26).

In the first place counsel for the appellants was under the impression that the evidence introduced was according to the scope and object for which the hearing was held to determine the character of judgment to be entered against appellee, and this is clearly shown in page 1 and page 5 of the memorandum submitted by appellants to the District Court for this hearing on June 4, 1954, in which it stated "We consider the entire testimony entirely unrelated to the subject matter of this hearing" and on page 10 they pleaded their adjudicated water right from Cause 321.

This memorandum as well as the memorandum of appellee for the same hearing, dated June 16, 1954, are before this Appellate Court as part of the record of this appeal. It can be seen from appellee's memorandum that in June 1954 appellee was urging at the same time the identical issues, on same evidence, with identical arguments, in two Courts, in the District Court, with memorandum and in the Appellate Court with his brief as appellant in case 321.

If our contention is right that the Court had no jurisdiction in the 1954 proceedings all appellee's references indicated in his brief from R 347 to R 636 are not before this Appellate Court because this part of the record contains the above mentioned proceedings.

It follows that since the District Court was without jurisdiction in the proceedings of May 9, 1954, its findings of fact, conclusions of law and judgment of April 17, 1957 which were deduced from the above mentioned proceedings are null and void on the face of the record.

CONSOLIDATION FOR TRIAL.

Appellee represents to this Court that cases 321 and 221 were not consolidated for trial (Appellee Brief, pages 27-28).

The fact whether or not cases 321 and 221 were consolidated for trial is shown on the face of record. At the beginning of the 1952 trial on May 13 the Clerk of the Court in announcing the cases before the Court stated:

The Clerk. Civil 221. Prescott, John Phillip Zannaras and J. P. Robinson, Jr., v. Bagdad Copper Corporation, and plaintiff's amended Petition for Relief for hearing 321 Prescott Bagdad Copper Corporation, a corporation, v. John Phillip Zannaras, et al., for trial (14248 R 51-52).

Zannaras-Robinson had pleaded in both 221 (R 5) and 321 (14248 R 11) deprivation of water by Bagdad. This alleged fact was common to both cases and the evidence, adduced to support this fact, was common to both cases.

Bagdad had with words distinct and sufficient connected the pleadings of cause 221 and 321 (R 22-23). Both cases 321 and 221 had common points of law, that is, the validity of Zannaras-Robinson water right. The evidence of the deprivation of Zannaras-Robinson water is spread throughout the entire transcript.

The judgment rendered on cause 321 was deduced from the entire record, not from a certain number of pages.

At the beginning of the trial in 1952 Bagdad stated:

> "Mr. Wilmer. In the interest of saving time I desire to go along with the business of trying the cases together but I do feel that we should attempt insofar as possible to separate them because in the event one should go up and the other does not.
>
> The Court. Why not consolidate? It is all the same issue." (14248 R 52).

It is apparent that if the issue was the same as the Court stated, Bagdad's opinion or expectation that if one case should go up and the other does not . . . was incorrect because for the same issue it was impossible to have two contradictory judgments.

If cause 321 determining the validity of the Zannaras-Robinson water rights was lost to Zannaras-Robinson, case 221 in which Zannaras-Robinson were asking injunctive relief and damages would have been dismissed.

If cause 321 was decided in favor of Zannaras-Robinson case 221 would have been automatically lost to Bagdad, because the Court had to protect the Zannaras-Robinson water rights by an injunction against Bagdad. This point is explained in Kinney on Irrigation and Water Rights Second Edition Vol. 3 P. 12628, page 2974.

> "INJUNCTIONS TO PROTECT DECREED RIGHTS. Although the rights of the respective parties to the use of waters from the same source of supply may be adjudicated and as so adjudicated may be protected by injunction granted in the same action, this is not always done.

> Where, however, the rights have been adjudicated in previous action, and the decree is in full force and effect an injunction in a subsequent action will always be granted in a proper case to prevent interference with rights decreed by the parties to the previous action. Such an action is to protect priorities already established and not to determine them." Citing *Medano D. Co. v. Adams,* 29 Colo. 317, 68 Pac. Rep. 1958.

It is therefore apparent that the Court was right when it stated it is all the same issue and Bagdad had a misconception that one case can go up and the other may go down.

It clearly appears from the record that case 221, the amended petition for relief, and case 321, were placed, by the Court, on the same hearing by the Court's discretion. They had common points of fact and law which appear throughout the entire record.

Bagdad wished to attempt insofar as possible to separate them, but this was not done, and could not have been done, on account of common points of fact and law.

It appears, therefore, that cases 321 and 221 were consolidated for trial as it has been stated by appellants.

APPEALABILITY OF THE 1951 JUDGMENT.

Appellee states in its brief (page 2) that the 1951 judgment adverse to appellants from which no appeal was taken and which has long reposed undisturbed . . .

By this statement appellee attempts to convince this Appellate Court that the interlocutory decree of the 1949

trial is not appealable because an appeal should have been taken in 1951 when the interlocutory decree was issued by the Court.

Bagdad is in error because the appealability of a decree is determined by the finality of the decree. We quote from *Hunter v. Federal Life Ins. Co.,* 103 F. 2d 192:

> "Judgment or decree, to be reviewable, must be not only final, but complete, that is, final not only as to all parties, but as to whole subject matter and all causes of action involved, and if not complete, appeal must be dismissed."

Also, we quote from: *Western Union Telegraph Co. v. United States & Mexican Trust Co., et al.,* 221 Fed. 545.

> "At the entry of the final order or decree in equity all the proceedings, interlocutory orders and decrees relative to the matters in controversy between the parties in interest therein are subject to revision by the Court entering the final order or decree, and on an appeal therefrom they are reviewable by the Appellate Court and may be heard at the tame times."

It is unquestionable that the interlocutory decree of the 1949 trial when the Court kept cause 221 under its jurisdiction could not be appealed at the time of entry of the judgment in 1951 and it is appealable now with the final disposition of cause No. 221 and should be reversed.

The entire first volume of this appeal and part of the second volume constitute the transcript of the 1949 trial; at the beginning of the 1952 trial on May 1952 the Clerk of Court in announcing the cases stated:

> "The Clerk. Civil 221 Prescott, John Phillip Zannaras and J. P. Robinson, Jr., v. Bagdad Copper Cor-

poration and plaintiff's amended petition for relief for hearing 321 Prescott, Bagdad Copper Corporation, a corporation, v. John Phillip Zannaras, et al., for trial (14248 R 51-52)."

The above clearly shows that case 221 was before the Court for trial in the 1952 hearing and the judgment of the 1949 trial was not final judgment for cause 221 Prescott.

At the beginning of the 1952 trial counsel for appellant stated:

"Mr. Morgan. We desire as far as possible not to refer back to that, because as counsel said, in the case of appeal there is no use going back in the original record. I imagine.

The Court. There is no original record. We are still trying 221. The Court held in abeyance (14248 R-55)".

The judgment of the 1951 trial (R 12) was erroneous and must be reversed.

At that trial Zannaras-Robinson offered their water right in evidence without objection from Bagdad (R 101). In the following case it is shown that failure to object when a water right is introduced in evidence constitutes a prima facie case of the truth of the water right. *Water Rights of Owyhee River,* 124 Ore. 44, 259 Pac. 292.

The Court found in the 1952 trial that Bagdad had actual and constructive notice of the issuance of Zannaras-Robinson water right on January 2, 1945 (14248 R 39).

Bagdad consented to judgment against it on July 21, 1945, in which judgment it consented that Zannaras-Rob-

inson was lawfully using the water of Burro Creek (14248 R 432).

This case was before the same Court and brought by Bagdad to the judicial notice of the Court by introducing evidence from case 129 in the 1949 trial (R 327-329).

Bagdad admitted in its pleadings of cause 321 that Bagdad in the 1949 trial was not permitted to question the validity of the Zannaras-Robinson water rights (14248 R 8-9).

Zannaras-Robinson having established a prima facie case it was upon Bagdad to prove by clear and convincing evidence that it did not interfere with the Zannaras-Robinson vested rights. The Court erred in placing the burden of proof on Zannaras-Robinson. This subject is dealt with extensively in appellant's brief under Burden of Proof, page 19.

It is clear that the findings do not support the judgment and this being an error at law in an equity case it is open for review by this Appellate Court under all circumstances.

REPLY TO STATEMENT RE JURISDICTION.

Appellee states:

> "Neither the District Court nor this Court on appeal in case 321 determined the same water rights" as are involved here (page 2).

The record clearly shows that the Zannaras-Robinson water right No. 1341 admitted in evidence as Exhibit No. 1 (R 101) in the 1949 trial of case 221 and is before this

Appellate Court (R 652). The same Zannaras-Robinson water right No. 1341 was introduced in evidence as Exhibit A (14248 R 22) in the 1952 trial of the consolidated for trial cases 221 and 321.

Bagdad's water right certificate No. 1314 was introduced as Exhibit L-1 in the 1949 trial of case 221 (R 324) and again as Exhibit J (14248 R 397) in the 1952 trial of the consolidated for trial cases 221 and 321.

Both water rights of appellants and appellees are clearly identified by number, amount of water and dates of priority in the findings of fact (14248 R 38) of case 321, affirmed by this Court (229 F. 2d 920). Appellee (Bagdad) makes no further statement to distinctly point out by the record that different water rights are involved in causes 221 and 321. It therefore appears that this statement of the appellee is entirely unfounded.

Appellee states:

> "Practically the entire second volume of the Transcript of Record is made up of evidence, taken long after cause 321 was submitted to and decided by the District Judge."

According to counsel's admission appearing on the record the entire second volume is not evidence but computations. He states, addressing the Court:

> "We will show you by computations that . . ." (R 354)

and as we have demonstrated in appellant's brief (pages 66-67) these computations are contradicted by all Bagdad witnesses who testified to the facts predicted by those computations.

INCONSISTENT STATEMENTS OF APPELLEE.

Appellee has scattered through its reply brief certain attacks on appellants as to the real intentions of appellants' attempting to represent to this Court that the present case on appeal is a "hold up" case, notwithstanding the fact that the record shows that appellants have spent $250,000.00 in their properties (14248 R 352).

Although we feel that it would have been unnecessary to give reply to them, however, we will point out to this Appellate Court the inconsistence of these attacks and innuendoes. Appellee states in its brief (page 22) that Zannaras knew that the creek historically dried up . . . and quotes Zannaras: "I have known that there are seasons of the year when there is no running water to be seen in Burro Creek" (14248 R. 411). We give below the full statement of Zannaras from which the above fragment is taken, from a deposition taken on the 2nd of July, 1945, prior to the polution trial case 129 Prescott (14248 R. 400):

"Q. As I understand it Burro Creek is a running stream?

A. Yes, continuous.

Q. How much water does it carry?

A. Well, in a dry season it carries very little.

Q. If I went out there today, how much water would there be running down the creek there?

A. Well, there is now, right today, there is enough water, but in the drier season——

Q. How wide a stream?

A. I should say the stream runs in places about ten inches wide and about three inches deep.

Q. And then of course when it gets there is rain or other water, it runs pretty high some time?

A. It is getting much less water. I have known that there are seasons of the year when there is no running water to be seen in Burro Creek." (14248 R. 411).

The above testimony made in July 2, 1945, clearly shows that Zannaras stated that Burro Creek is a continuous running creek. In fact the same was the understanding of the counsel as it is shown from the question he made.

If Burro Creek was a dry creek for five months at the Zannaras-Robinson point of diversion as it is shown by the affirmed judgment of this Court the counsel could never have made such question.

"As I understand it Burro Creek is a running stream", and he should have resisted Zannaras' answer: "Yes, continuous", which clearly shows that the flow of the creek was not intermittent.

The Zannaras testimony is in complete agreement with other testimony and especially with the testimony of Mr. Albert Austin (14248 R 122) postmaster at Congress who was the only witness who lived at the Zannaras-Robinson place from 1933 to 1936 (14248 R 121).

It also agrees that in a dry season at certain points the creek flows under sand and gravel and emerges when the bed of the creek is solid rock (14248 R 127). Appellee states in his reply brief (page 22)—quoting Mr. Zannaras: "No, this time today we have a very dry spell along there; it is now dry this time." (14248 R 390).

The above is also a fragment from Bagdad's Exhibit G which is part of the transcript of the pollution case 129

Prescott (14248 R 374). This testimony was taken on July 21, 1945. We quote the statement from which this fragment was taken:

> "Mr. Wilmer. Mr. Zannaras, referring to these pictures identified as plaintiff's Exhibit G. These pictures were taken when Burro Creek was rising or running more than ordinary, were they not?
>
> A. No.
>
> Q. You mean you now state to the Court today that these pictures represent Burro Creek in its normal flow?
>
> A. I don't know what you mean by normal flow.
>
> Q. Like its normal flow?
>
> A. Now there is very little water running through. There was some water going through at that time.
>
> Q. Is it not a fact that these pictures do not represent Burro Creek as you saw it, the biggest part, throughout the year?
>
> A. No. This time today we have a very dry spell along there; it is now dry this time of the year" (14248 R 390).

The above testimony clearly shows that on July 21, 1945, Zannaras testified that there was very little water running through. Nineteen days before July 2nd, he testified that the width flow of the creek was ten inches wide by three inches deep (14248 R 411).

The last statement, dry spell, etc., refers to the weather and not to the water in the creek.

Appellee in its brief (page 22) attempts to represent that Zannaras-Robinson picked a diversion point where the gravel is thick so there will be not water flowing in order to create trouble for appellee.

Mr. Sherman Decker of the U. S. Geologic Survey Surface Water Division an entirely impartial witness testified that the Zannaras-Robinson diversion point is in solid rock (14248 R 129). Mr. C. H. W. Smith, Engineer of the Water Commissioner of the State of Arizona testified that Zannaras-Robinson point of diversion is on rock (14248 R 118). Mr. Albert Austin, Postmaster at Congress, testified the same thing (14248 R 127).

Appellee repeatedly states in its reply brief that Zannaras-Robinson refused to work their mill. Appellants in their pleading specifically plead that it is impossible to work economically without their water (R 14, R 5, 14248 R 12). We quote from the record:

> "Q. What I am curious to know Mr. Zannaras is why, when there is no opportunity to run your mill, you don't make any effort to get ready to run it when the time comes to run it.
>
> A. All right, let me answer it. The conditions you fellows have created for me up there makes it impossible for anyone to work under those conditions. What do you want me to do?" (14248 R 103).

Bagdad stated in their pleadings of cause 321 (14248 R 5) and in the opening brief of cause 321 (page 2) to this Appellate Court that without the Zannaras-Robinson water they will have to close down, yet they do insist that appellants should work without water intermittently and uneconomically which they themselves cannot do.

Appellee admits there are water problems for all and it tried to solve them by building a dam. However, it states that appellants prevented it because appellants filed a protest and also filed a right of way near the place of

its damsite, which for some unexplained reason made appellee quit its original damsite to a new damsite one mile down stream. Appellee fails to show why it did not build the dam in the new location to solve everybody's water problems. This testimony appears on (R 611, 612, 596, 597).

The above testimony is given by Mr. Dickie the General Manager of Bagdad who continues on page 614. He is asked the following question:

> "Q. You hope to find a well perhaps, that would give you that supply, in the event Mr. Zannaras' position is finally sustained, is that correct?
> A. Yes."

This testimony was taken on March 11, 1954, while the Zannaras-Robinson water right was on appeal.

The General Manager of Bagdad admits that if the Zannaras-Robinson water rights are sustained by the Appellate Court he must have a well to give him the supply he is now taking from the Zannaras-Robinson water rights.

The Zannaras-Robinson water rights were sustained and affirmed on January 30, 1956.

There is nothing in the record to show what happened to the well.

More than a year after the issuance of the Mandate of this Appellate Court, ordering the Zannaras-Robinson were entitled to waters of Burro Creek without interference from Bagdad.

The District Court, by this judgment in April, 1957, reversed and impeached the judgment of this Appellate

Court and in effect cancelled the priority and the Zannaras-Robinson water rights.

Appellee in its reply brief (page 12) as well as in its brief of case 321 (page 41) attempts to impress this Appellate Court of the importance of its operations to the economy of the State and the unimportance of the appellants' operations. We believe that the following quotation from *Morris v. Bean et al.,* 146 Fed. 423, will be of assistance to this Appellate Court in the understanding of appellant's case because the above case seems parallel and coincident to several points of the present appeal.

Morris v. Bean et al., 146 Fed. 423.

"The appropriators took with the right to have the stream continue to flow as it was wont to flow, and to remain in the condition in which they found it, and whenever water is diverted above it keeps back that which would otherwise reach them, and the more water that is kept back the less will the complainant and intervenor have. But for the wholesale diversions by defendants the water would reach them later in the season and abide longer, and this is what their appropriations entitle them to. In the abstract there would be more people benefited by allowing the defendants to take all water. Its flow through a sandy and gravelly stretch of something like eight or ten miles, and perhaps farther, is in a measure, a waste, but equity does not consist in taking the property of a few for the benefit of the many, even though the general average of benefits would be greater. It can no more ignore well-defined legal rights than it can go in the face of a positive statute.

"Then again, the theory of the defendants cannot be accepted. The witnesses perhaps have told the

truth, but not the whole truth. That the water would not reach one lower down the stream is quite a common defense. It is often urged in irrigation suits by trespassers as a justification for their invasion of the rights of others.

"It is probably as old as irrigation and perhaps as trespass itself. In this case failure of the water to reach the complainant and intervenor was coincident with its use by the defendants. The fact that witnesses saw in the varying changes of the seasons a shortage of water at different points on the stream does not explain the whole situation: in other words, in one extremely dry season perhaps the water was lower than in another. It varies, and it varies because of the shortage of the supply above, and these defendants retarded its flow by reason of their diversions, which decreased the supply to that extent which prevented it from reaching Wyoming at all; and when the supply is diminished by the light snowfall the diversion of the defendants increases the shortage, and that is an invasion of the rights of the appropriators who are seeking the enforcement of their priorities in this suit."

The Court then ruled as follows:

"The decree will enjoin the defendants from diverting the water of Sage and Pine Creeks to the prejudice of the parties found to be entitled to the same as prior appropriators the costs will follow the decree."

BURDEN OF PROOF.

Appellee states that the Court applied the rule based on the following principle:

A party who bases his right on prescription or adverse possession or abandonment or forfeiture of prior right has the burden of proof as to such matters, but, when he makes a prima facie showing the adverse party has the burden of rebutting to overcome it. 93 C.J.S. 1014, 1015, see 201—67 C.J. 1061, note 19.

The subject matter of the present case on appeal is shown affirmatively in the pleadings. Case 221 is not a question of adverse possession, or prescription. It is an interference with the prior vested rights of appellants due to numerous illegal acts by appellee. Bagdad's pleadings distinctly show that it is a straight denial of appellants' allegations (R 7-9; R 22-23).

In fact, in view of the ultimate theory of defense assumed by Bagdad, it was a requirement of the law that Bagdad should have made specific pleadings, which it did not. This subject is discussed by Kinney on Irrigation and Water Rights. Vol. 3, pages 1634, 2995.

> "Where, also, the defendant relies upon the defense that the water if not diverted by him would be of no benefit to the plaintiff, for the reason that it would not reach him anyway, there is no question but that such a defense must be specially pleaded."

Citing:

Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112;

Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39;

West Point Ir. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

ANSWER—RES JUDICATA.

Appellee states in its brief:

> "The Court by further minute order vacated the order taking cause No. 221 under submission specifically for the purpose of hearing further evidence."

The record affirmatively shows that the evidence the Court wanted was for the purpose of determining the character of judgment to be entered against Bagdad (R. 23-25; R. 348).

Appellee further states:

> "An order or judgment of the Court is not final . . ."

also

> "Where two inconsistent judgments are rendered between the same parties the last in time controls."

On January 30, 1956, this Appellate Court affirmed case 321. The effect of this affirmance was that the judgment in 321 became the judgment of the United States Court of Appeals, *United States v. Reid & Others,* 17 F. 497.

In *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.,* 72 Fed. 545, it is stated the decree and mandate of the Courts of Appeals have precisely the same finality as the decrees and mandates of the Supreme Court.

When the mandate of the United States Court of Appeals for the Ninth Circuit was entered in the District Court on March 12, 1956, the judgment of cause 321 had the finality of a decree of the Supreme Court of the United States.

We also quote from *City of Orlando v. Murphy,* 94 Fed. 2d 426. An affirmance on appeal is *res judicata* and no

power exists after the term to alter the decision and this is also true where the mandate requires the entry of specific judgment. This also is stated in *Seagraves v. Wallace,* 69 Fed. 2d 163.

On April 17, 1957, more than a year after the issuance of the Appellate Court's mandate, the District Court by its judgment reversed and impeached a judgment having a finality of a judgment of the Supreme Court of the United States on the same issue and evidence, namely, the deprivation of the Zannaras-Robinson water by Bagdad notwithstanding the fact that it was brought to the attention of the District Court by the appellants with strong and forceful representations that the District Court had no power, authority, jurisdiction or discretion to enter its judgment in defiance of the judgment of a higher Court as no power exists to change the decision of the Appellate Court after the term.

The District Court's persistent refusal to exercise its duty to follow what the higher Court decided resulted in the judgment of the District Court of April 17, 1957 being an error of law apparent on the face of the record.

As stated in our opening brief, page 39:

> "Proceedings contrary to the mandate must be treated as null and void. * * *"

Appellee further states, page 26:

Thirdly and conclusively:

> ". . . A sufficient answer is that neither by pleadings nor evidence were the proceedings in this other case brought before the court of claims in the present suit. If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in

some other case between himself and his antagonist, he cannot insist upon the benefit of res judicata, and this although such prior judgment may have been rendered by the same court. . . ."

We stated in our opening brief (page 13) appellants pleaded the adjudication of case 321 before the District Court in their motion (R. 23-27).

Distinctly and sharply the decision of cause 321 was brought to the attention of the District Court by the following objections which are part of the record of this appeal:

"That the Findings of Fact proposed by the Defendant in Paragraphs 2-3-4 and 5 are wholly contrary to the Evidence before the Court and duly received by the Court in each of said causes of action, #221 and #321, which were consolidated for trial and Hearing."

(Objections to the proposed Findings of Facts, page 2.)

"Plaintiffs further object to the Judgment proposed by defendant in said cause of action for the reason and upon the grounds that said Judgment proposed by Defendant is contrary to the Law and is in violation of Plaintiffs' Rights as adjudicated by the Court in that cause of action entitled

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Defendants.

cause of action #321, as shown by the Judgment of said cause of action with which this cause of action,

#221, was duly consolidated, as shown by the Records on file in these Proceedings.

"Plaintiffs' Objection #7

"Plaintiffs further object to the Findings of Fact, Conclusions of Law, and Judgment as prepared by Defendant for the reason that the cause of Action #221 in the above entitled Court was duly consolidated with cause of action #321 in the above entitled Court, and that on November 12, 1953, this said Court in said cause of action, #321, duly entered its Findings of Fact, as follows, to-wit:

> 'After the issuance of defendants' certificate of water right, they used in their mining and milling operations and for domestic purposes, and put to beneficial use each year considerable quantities of water. For approximately five (5) months in each year, due mainly to plaintiff's pumping operations and use of water above, there was no water at the defendants' point of diversion.'

"And that said Findings of Fact, Conclusions of Law, and Judgment entered by this Honorable Court on November 12, 1953, in cause #321 consolidated with cause #221, were duly affirmed on appeal by the United States Circuit Court of Appeals for the Ninth Circuit, and the fact that Defendant wrongfully and illegally took from Plaintiffs the water the use of which Plaintiffs were entitled to use and enjoy has been finally adjudicated and determined and is Res Judicata and this Honorable Court does not now have the power, discretion, jurisdiction or authority to adopt, approve, or enter the Findings of Fact, Conclusions of Law, and Judgment proposed by Defendant, and this Honorable Court has now only the power, jurisdiction and authority to enter judgment in favor of Plaintiffs and against Defendant, forever

prohibiting, debarring, and enjoining Defendant from taking from Plaintiffs the use of the water granted to Plaintiffs by the State of Arizona, by Certificate of Water Right 1341, dated January 2, 1945, with priority to such water from August 27, 1940, as set forth by this Honorable Court in its Findings of Fact dated November 12, 1953, in cause of action #321 consolidated with cause of action #221.

"Plaintiffs' Objection #8

"Plaintiffs further object to the Fndings of Fact, Conclusion of Law, and Judgment as proposed by Defendant for the reason that the same are inaccurate, incomplete and erroneous in that said Findings of Fact, Conclusions of Law, and Judgment proposed by Defendant fail to show that Defendant's appropriation of water was inferior to Plaintiffs' Water Right, Certificate of Water Right #1341, and fail to show that Plaintiffs' Water Right is prior in time and prior in right, and paramount, to any water right claimed, owned or possessed by Defendant, and said Findings of Fact and Conclusions of Law as proposed by Defendant fail to set forth the fact that Defendant did unlawfully and illegally change the diversion and manner of use of water and did unlawfully and illegally, annually extend the use of the water and did unlawfully and illegally appropriate 155,000,000 gallons of water annually in excess of the amount of water granted Defendant by the State of Arizona, by Certificate of Water Right 1314, and said Findings of Fact and Conclusions of Law proposed by Defendant fail to show that Plaintiffs' Water Right is prior and paramount to the Water Right granted to Defendant by the State of Arizona, and said Findings of Fact and Conclusions of Law proposed by De-

fendant fail to show that Defendant deprived Plaintiffs, for a period of Five (5) months each year, or the use of the water granted Plaintiffs by the State of Arizona by Certificate of Water Right 1341.

"Plaintiffs' Objection #9

"Plaintiffs object to the Defendant's proposed Findings of Fact, Conclusions of Law, and Judgment for the reason that the same are contrary to and in conflict with the Evidence before the Court in cause 321, consolidated with cause 221, upon which this *Honorable Court based and predicated its Findings of Fact, Conclusions of Law, and Judgment, dated November 12, 1953, which said Judgment was duly affirmed on appeal by the United States Court of Appeals for the Ninth District and upon which Judgment on the Mandate so issued by said United States Court of Appeals for the Ninth District was duly entered in this Court on March 12, 1956, and the facts upon which this Honorable Court based and predicated its Findings of Fact, Conclusions of Law, and Judgment, dated November 12, 1953, in case 321 consolidated with cause 221, have been finally adjudicated and determined and are Res Judicata, and this Honorable Court does not now have the power, jurisdiction or authority to alter, amend or modify the Findings of Fact, Conclusions of Law and Judgment dated November 12, 1953, in said cause 321 consolidated with cause 221, by adopting, approving, signing or entering the Findings of Fact, Conclusions of Law, and Judgment as now proposed by Defendant and as now submitted to this Honorable Court by Defendant.*"

(These objections appear in the record in a separate document.)

It appears that appellants strongly and clearly called to the attention of the District Court that the deprivation of the Zannaras-Robinson water by Bagdad was Res Judicata, and that after the decision of the Circuit Court of Appeals that the District Court was limited in obeying the mandate.

In *Munro v. Post,* 102 F. 2d 686, it is stated that

> "The phrase 'Law of Case' when used to express the lower Court's duty to follow what higher Court has decided at an earlier stage of the case, applies to everything decided, either expressly or by necessary implication . . ."

It should be remembered that at the beginning of the 1952 trial when the cases were consolidated for trial it was the understanding that the Court would issue separate judgments for each case (14248 R. 51-54).

Upon affirmance of case 321 the District Court refused to exercise its jurisdiction to issue the judgment for 221 in compliance with the mandate of the Circuit Court and misconstrued and willfully disobeyed the mandate of the Circuit Court.

The effect of the judgment of the District Court is in effect delivery to the appellee of real property belonging to the appellants in defiance and contravention of the judgment and mandate of this Appellate Court having the finality of a judgment and order of the Supreme Court of the United States.

The District Court even failed to respect the constitutional rights of the appellants which they interposed in an

effort to stop the judgment, by specifically pleading in their objections to the Court.

On May 14, 1957, appellants filed a notice of appeal from the judgment entered in case 221 on April 17, 1957. This notice which is part of the record in this appeal shows that it was served on Mr. Perry Ling, attorney for the appellee, and brother of Judge Dave W. Ling, who issued this judgment.

We call the attention of this Appellate Court to that part of the record on pages 379 and 380 which we quote:

"Q. (by Mr. Wilmer). Going back just a minute, Doctor, on the geology of this situation. Generally speaking, can you tell whether the mountain range which lies to the, I believe you said to the—maybe you better say. Have you prepared a diagram?

A. I have prepared a rough sketch showing the trend of the mountain range from the Big—from the Aquarius Mountains, the Grayback Mountains, the Miller Mountains, and Big Ship Mountains. It is the mountain range extending from north northeast to south southwest.

Mr. Wilmer. May I have this marked for identification?

The Clerk. Defendant's Exhibit Q for identification.

(Said document was marked Defendant's Exhibit Q for identification.)

Mr. Wilmer. So the court and counsel can see what you are doing, Doctor, I will put this on the Board.

Q. (by Mr. Wilmer). Now, Doctor, would you explain the diagram you have prepared, and identified first all the various (42) points?

Mr. Morgan. We object to that unless it has been offered in evidence.

The Court. We can use it until Mr. Fletcher testifies. Go ahead." (R. 379-380.)

Mr. Fletcher never had appeared before this Court on this case.

The Court in effect made a ruling which is based on knowing beforehand what a witness not before the Court will testify and what the effect of the testimony of this witness will be.

This case has been before the Court for ten years. Appellee knew in 1949 from the report of the engineer (14248, R. 119) of the Water Commissioner that it was drying the creek and therefore it was taking the water of the appellant.

The principle on which appellee prosecutes this case is that justice delayed is justice denied.

Case 321 was brought to delay justice in this present case and it should have been dismissed as a collateral attack as the Circuit Court remarked in the oral argument of that case. The present judgment being openly and clearly contrary to the law and contrary to the settled laws of logic it appears to have the same effect, that is, a delay of justice, as counsel for appellee must have known that reversal of this judgment was inevitable.

It took three years for the District Court to exercise its jurisdiction after case 221 was submitted, from June 1954 to April 17, 1957 (R. 646-647).

In view of the disposition the District Court made denying injunction appellants believe that they were entitled to an earlier decision so they could appeal their case.

Appellants therefore respectfully submit and petition this Appellate Court that if the present case is reversed, as appellants believe it will be, to instruct the District Court of Arizona to secure the services of another judge to enter judgment and determine the damages for appellants.

Regarding the above request it should be noticed from the Record that appellants changed eight attorneys during this litigation (R 638-649).

THE LAW OF THE CASE.

Appellee attempts to represent to this Court that the issues decided in cause 321 were such that the Rule of Law case is inapplicable in the present case 221.

The contradiction of its assertion becomes apparent from its own writings.

Appellee states (App. Brief page 27):

> "That the Court collaterally made a finding to the effect that the main cause of appellant's non-user was use by Bagdad."

On page 46 of Bagdad's brief in cause 321 we find Bagdad representing this Court that "Any rights defendants ever had were forfeited through non-user".

It is apparent that if the main issue made by Bagdad in cause 321 was that Zannaras-Robinson lost their right

through non-user and the Court found as they state above that the main cause of Zannaras-Robinson non-user was use by Bagdad. Then the issue of the deprivation of the Zannaras-Robinson water was necessary for the just disposition of Cause 321 and became the law of the case by the affirmance of said cause.

PRIMA FACIE CASE.

Appellee in its brief (page 31) states the failure of the water to reach the Zannaras point of diversion was directly related to the soil conditions and topography and not to the relatively small amount of water pumped by Bagdad.

That this statement is incorrect is affirmatively shown by the Federal Government water gauge readings shown in appendix A of our opening brief according to these gauges.

The total water left by Bagdad to pass its point of diversion from May 1, 1949, to May 1, 1951, was 4343.3 acre feet in two years, or 2186.6 acre feet per year. Bagdad takes out 1100. acre (R 471) feet or it removes according to the gauges the one third of the yearly flow of the creek, and for five months in the summer and fall it leaves practically nothing in the creek.

CHANGE OF METHOD AND MEANS OF DIVERSION.

Bagdad admits the changes it made but insists that this change is a water salvage operation. It saves water, and

it is entitled to it, and to support the incorrect assumption that it saves water where in fact it takes water belonging to the appellants, and wastes water by evaporation, cites numerous cases in its brief on page 32 applicable in salvaging water, but inapplicable in the present case because this is not salvage operation.

The results of this so-called salvage operation were:

(1) Building a dam illegally by moving two million yards of earth (R 172-175).

(2) Impounding and storing illegally 325,000,000 gallons of water (R 585-587).

(3) Created a 100 acre lake (R 586).

(4) It caused a loss by evaporation of 200,000,000 gallons of water, which condition was not existing before the changes were made (R 560).

(5) It dried up the creek at Zannaras-Robinson diversion point for five months each year, as found in cause 321 affirmed by this Appellate Court (229 F. 2d 920) (14248 R 39).

"ADMITTED USE MORE WATER THAN ENTITLED TO USE UNDER CERTIFICATE OF WATER RIGHT."

"USE OF WATER FOR PURPOSES OTHER THAN ITS OWN MINING OPERATION."

Appellee attempts to represent that the figure showing that 1100 acre feet are pumped out of the creek by Bagdad is based on assumptions.

The record affirmatively shows that this figure is reached by meter readings. Mr. Thiele testifying stated:

"Q. And the Bagdad discharge or take out from the river is computed on what basis?

A. On the measuring value—on the meter reading values.

Q. In other words the amount, the figures that you have on Bagdad are related to the actual water taken out.

A. Yes." (R 471).

The record shows that none of the companies receiving water from Bagdad are related to it; neither does it support appellee's statement that the amount of water involved is inconsequential and appellee must be enjoined.

FINDINGS OF THE STATE ENGINEER.

The casual testimony of a witness, quoted in appellee's reply brief is shown by the record to be the Engineer of the Water Division who has custody of the original records of the Water Commissioner of the State of Arizona (R 322). His testimony is from an official report (14248 R 111), which report, as the record shows, was received in time by Bagdad (14248 R 119).

Bagdad was informed officially by the Water Commissioner of the State the conditions it was creating in 1949 at Zannaras-Robinson point of diversion by drying up the creek, yet up to 1951 the entry of the judgment of the 1949 trial was representing to the District Court that there was plenty of water for Zannaras-Robinson and then it reversed its position with a new theory.

There is no attack whatsoever as to the facts testified by the Engineer of the Water Commissioner of the State of Arizona that the creek was dry in November.

Appellee is equally silent on the testimony of Mr. Sherman O. Decker, Engineer in charge of the U. S. Geologic Survey Surface Water Division, who testified (14248 R 128-130) that the creek was dry on November 23, 1950, and identified the Zannaras-Robinson photographs.

The testimony of the above engineers is unimpeachable as to impartiality, competence and authority. It is in sharp conflict with the findings of Court that from September there is water for both parties.

TESTIMONY CONTRARY TO THE WEIGHT OF THE EVIDENCE.

Appellee failed to give any answer on the following questions raised in appellants' brief which clearly supports that the judgment is contrary to the weight of the evidence.

(1) The testimony of Mr. Sherman O. Decker, Engineer of the U. S. Geologic Survey Surface Water Division, showing that the creek was dry on November 23, 1950, while the Court's finding is that from September there is sufficient water for both parties.

(2) The testimony of Mr. C. H. W. Smith, Engineer of the Water Commissioner of the State of Arizona, testifying to the same effect as Mr. Decker above.

(3) It failed to answer about appellee's sworn testimony that in 1939 at a time prior Zannaras-Robinson or

Bagdad were taking any water from Burro Creek there was a minimum flow of 1000 gallons per minute even in the dry seasons.

(4) *It completely failed to answer or give any comment whatsoever on the most important exhibit in this case, the Federal Water Gauge reading showing the water appellee leaves in the stream for Zannaras-Robinson use.*

(5) It failed to answer about the interference with the underflow of the creek.

(6) It failed to answer with the interference of the natural bed of the creek.

(7) It failed to answer for the illegal storage of 315,000,000 gallons of water.

The failure of appellee to answer these questions must now be assumed as admitted.

WATER RIGHT A PROPERTY RIGHT.

Appellee states in its brief (page 36):

> "Certainly, too, it is significant that appellants have made no effort to tap the water moving in the gravels at their point of diversion . . ."

The appellee definitely and repeatedly represents to this Appellate Court that appellants must dig and keep on digging in the bed of the creek until they get water. The record shows that appellee made such an effort by making a deep pit (Exhibits 4-16) at their point of diversion without success.

Mr. Charles Everett Trygg, Sanitary Engineer for the State of Arizona, an impartial witness, testified in the 1952 trial as follows:

"Q. I will ask you to look at 4-16. Do you remember what that represents?

A. I think this was an attempt by someone to get water, they dug a large pit, it was pretty dry when I was up there.

Q. Was that up at the Bagdad sump?

A. It was comparatively close to it. Yes." (14248 R 134).

Zannaras-Robinson pled in their amended petition for relief as follows:

"That plaintiffs are entitled to the flow of the stream in the manner and form in which it was before defendant's acts reduced the flow of the stream as above stated dried up the flow entirely" (R 20).

That the appellants are entitled to have the creek flow as it was flowing at the time of the initiation of their water right is supported by ample authority as quoted below:

In *Comstock et al. v. Ramsay,* 133 P. 1107:

"The Court said to the proposition that appropriations of water out of a natural stream for irrigation purposes, with priorities decreed, are entitled to have the conditions substantially maintained upon the stream as they were when the appropriations were made and have existed during the continuance and perfection of such appropriations. We cite the following authorities:

Handy Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 515, 62 Pac. 847; Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. 37; New Cache La Poudre Irri-

> gation Co. v. Water Supply & Storage Co., 29 Colo. 469, 68 Pac. 781; Baer Bros. Land & Cattle Co. v. Wilson, 38 Colo. 101, 88 Pac. 265; Cache La Poudre Reservoir Co. v. Water Supply & Storage Co. et al., 25 Colo. 161, 53 Pac. 331, 46 L.R.A. 175, 71 Am.St. Rep. 131; and Voget et al. v. Minnesota Canal & Reservoir Co. et al., 47 Colo. 534, 107 Pac. 1108."

In the present case the water rights of the parties are decreed and affirmed by the Appellate Court according to the terms of said water rights.

Appellants' water right was perfected on January 2, 1945 (14248 R 23). Appellee's water right was perfected on April 12, 1944 (14248 R 399). Appellants are using the water for 18 years from natural flow of the creek. Appellants have the right to insist that the conditions be maintained upon the stream as they were when their appropriation arose.

Appellants cannot be required now to dig into the gravel of the creek for water as Bagdad now proposes to this Appellate Court they should do.

As to the right of Zannaras-Robinson to the natural flow of the creek we quote from a decision of this Appellate Court in *Rickey Land & Cattle Co. v. Miller & Lux,* Circuit Court of Appeals, Ninth Circuit, March 4, 1907, 152 Fed. 11.

> "The right of an appropriator of the water of stream, for the purpose of irrigation, to have the water flow in the river to the head of its ditch is an incorporeal hereditament appurtenant to the ditch and co-extensive with the owner's right to the ditch itself."

District Judge Wolverton says:

So also in *Wyatt v. Lorimer & Weld. Irr. Co.,* 33 Pac. 144, 18 Colo. 298, 36 Am.St.Rep. 280, Mr. Justice Coddard speaking for the Court says:

> "That a valid appropriation of water from a natural stream constitutes an easement in the stream and that such easement is an incorporeal hereditament the appropriation being in perpetuity, cannot well be disputed."

And after citing Washburn on Easements and Servitudes and Angel on Water Courses proceeds:

> "The right acquired to water by an appropriator under our system is of the same character as that defined by the foregoing authorities as an incorporeal hereditament and easement. The consumer under a ditch possesses a like property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream and through the ditch for his use."

And generally, it is held:

> *"The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch and coextensive with his right to the ditch itself."*

Willey v. Decker, 73 Pac. 210, 225, 11 Wyo. 496, 100 Am.St.Rep. 939; *Smith v. Denniff,* 60 Pac. 398, 24 Mont. 20, 81 Am.St.Rep. 408.

Or putting it in another form that:

> "A right to divert and use the waters of a stream, acquired by appropriation is a hereditament appur-

tenant to the land for the benefit of which the appropriation is made."

Conant v. Deep Creek & Curlew Val. Irr. Co., 66 Pac. 188, 23 Utah 627, 90 Am.St.Rep. 721.

The principle of the right of an appropriator to the natural flow of the creek is discussed in Kinney on Irrigation & Water Right, Vol. 3, 2nd Ed., pp. 1610, 2931.

Under an appropriator's right to an injunction for unlawful diversion or diminution of quantity.

"A person who has acquired the right to the use of a certain quantity of water by an appropriation of the same or one who has in some lawful manner succeeded to the rights of an appropriator, is entitled to have the water continue to flow in the natural stream, or after diversion in his ditch, canal or other works so that he may continue to enjoy its use. Such right is a property right of which the owner cannot be deprived without due process of law and upon the payment of just compensation.

"Therefore, for the protection of such property right, and against the wrong-doer unlawfully diminishing the quantity of water to which the prior appropriator is entitled, by the unlawful diversion of the same, or otherwise, equity affords the appropriate remedy by way of an injunction. This is no modern Rule of Law, but has been enforced ever since the earliest times when the arid region Doctrine of Appropriation was adopted in the Western States of this country."

Appellee states in its brief (page 21) there is no provision in the certificate of water right that appellants are entitled to this relatively small amount of water

pro rata per day, per week, or per month (Plfs. Ex. A in Evid. 14248 R 22).

Appellants' certificate of water right (14248 R 22) specifically states that such water right was made under application No. A-2362 Permit No. A-1539 and also made proof to the satisfaction of State Land Commissioner of Arizona. That is proof of appropriation.

Application No. 2362, Permit No. 1539 (14248 R 13-17) and proof of appropriation (14248 R 18-22) were pled by Zannaras-Robinson in civil cause 321 consolidated for trial with cause 221 Prescott by attaching the said documents to the pleadings and made part thereof as Exhibit A (14248 R 13-24).

These documents are inseparable parts of the water right and expressly declare the conditions and detailed terms of water right No. 1341 granted to Zannaras-Robinson by the State of Arizona.

TERMS OF ZANNARAS-ROBINSON WATER RIGHTS.

1) *Amount* not to exceed 3,000,000 gallons annually (14248 R 14)

2) *Priority*—August 27, 1940 (14248 R 22)

3) *Source*—Burro Creek (14248 R 13)

4) *Time for use of water*—The year around (14248 R 18)

5) *Diversion*—Directly from the flow of creek, no dam (14248 R 14)

6) *Rate of removing* water from creek 60 gallons per minute (14248 R 19)

7) *Means of Diversion*—By pumps, engine, pipe, etc. (14248 R 14)

8) *Purpose of Use*—Mining and Domestic (14248 R 18)

The Zannaras-Robinson water rights were adjudicated and affirmed and specifically stated that such adjudication is made according to the terms of said water rights in the judgment of cause 321 consolidated for trial with 221 (14248 R 42).

Zannaras-Robinson according to the adjudicated terms of their water right are entitled to pump water out of the natural flow of the creek the year around at the rate of 60 gallons per minute, and by the means of diversion as indicated in the water right certificate.

It therefore appears that appellee's statement that there are no provisions in Zannaras-Robinson water right as to time and rate of water to be taken out are incorrect.

SUMMARY OF APPELLEE'S ARGUMENTS IN ITS REPLY BRIEF AND APPELLANTS' ANSWERS.

APPELLEE STATES:

1) That it built a dam to salvage water and that it is entitled to this water.

2) That its use of water does not interfere with appellants' water ascertained by expert opinion that water would not reach appellants' diversion point as it will be wasted by evaporation.

3) Appellants should dig in the gravel for water.

4) Appellants should have taken notice of creek conditions at the time of the initiation of their rights (R 35-36).

5) Last judgment of the District Court (April 17, 1957) denying injunction to Zannaras-Robinson controls.

6) Res judicata not brought to the attention of the Court.

7) Judgment of 1951 not reviewable.

APPELLANTS ANSWER:

1 and 2) Salvage operation, actually illegal diversion and extended use taking appellants' water, creating waste by evaporation.

3) Appellants insist that the natural flow of the creek is part of their adjudicated right and property. They cannot be compelled to dig in the creek for water.

4) Appellants insist that appellee should have taken notice of the creek conditions at the initiation of appellee's water rights as a junior appropriator. *State ex rel. Crowley v. District Court of Sixth Judicial Dist.,* 88 P. 2d 23.

5) Appellants insist that deprivation of their water by Bagdad has been decided in case 321 consolidated for trial with case 221, the present case. After affirmance of 321 appellants invoked the Law of the Case. Appellants claim the District Court's judgment is void as being contrary to the mandate and also based on the proceedings of 1954 when the District Court had lost jurisdiction.

6) Res judicata pled distinctly before the District Court.

7) Appellants insist that the Judgment of 1951 is reviewable, and seeks according to the pleadings the following (R 3-7; R 18-21):

a) Mandatory injunction to compel appellee to let the water down for restoration of appellants' property to the condition it was before being disturbed and wrongfully changed by appellee.

b) Prohibitive and perpetual injunction from illegally diverting and storing the water of Burro Creek, Boulder Creek and their tributaries.

c) Prohibitive and perpetual injunction from interfering with the natural flow of Burro Creek, Boulder Creek and their tributaries, to which the appellants are entitled.

d) Prohibitive and perpetual injunction from interfering with the bed and underflow of Burro Creek, Boulder Creek and their tributaries.

e) Prohibitive and perpetual injunction not to divert more water than appellee water right calls for and not to divert water for other uses than for the purpose of its water right by giving water to other mining operations.

f) That the Court determine appellants' damages according to their pleadings from June 28, 1948, until such time as appellee ceases its interference with appellants' water right, together with costs.

CONCLUSION.

It is the belief of the appellants that appellee failed to overcome appellants' affirmative proofs of the reasons for which the judgment of the District Court should be reversed, and respectfully submits that judgment be reversed with directions to enter judgment for Zannaras-Robinson as prayed, in accordance with instructions of this Appellate Court.

Dated, March 14, 1958.

Respectfully submitted,

JOHN PHILLIP ZANNARAS,

J. P. ROBINSON, JR.,

U. S. TUNGSTEN CORPORATION,

Appellants.